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THE DOCTRINE OF EQUITABLE CONVERSION: I, CONVERSION BY CONTRACT*

MILTON M. HERMANN

OF ALL the principles of equity, few have had consequences as far-reaching as the doctrine of equitable conversion. Too often this doctrine is thought of in a single context: The consequences, in equity, flowing from a contract for the sale of land, prior to the consummation of the sale by delivery of a deed. But the impact of this doctrine in other areas of our law—both on property and contract rights—has been enormous. Indeed, its role in the fields of Wills and Trusts—in determining the devolution of property to heirs at law, next of kin, devisees, legatees, and beneficiaries of trusts, both testamentary and *inter vivos*—sometimes overshadows its role in the area of contracts for the sale of land.

* II, CONVERSION BY WILL AND TRUST AGREEMENT, by the same author, will appear in a subsequent issue.

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A simple illustration, with varying factual situations, will serve to present the principal problems posed by the doctrine. For convenience, the parties to all cases discussed, both hypothetical and actual, will be designated throughout this article by these symbols: V for vendor, P for purchaser, W for widow or widower, and D for decedent. Unless otherwise indicated, it will be assumed that all parties are residents of Illinois, that all properties are situated here, and that all instruments are executed here.

V and P enter into a written contract under which V agrees to sell and P agrees to buy a residence for the sum of \$25,000.00, payable \$2,500.00 down and the balance upon delivery of a deed. The property is worth \$50,000.00, but for reasons of his own V is selling it to P at a bargain price. V is to convey a merchantable title, by warranty deed, within 60 days. He is the insured under a fire insurance policy in the amount of \$50,000.00, which he is to assign to P when he delivers the deed. The contract contains no provision as to who is to bear the burden of loss if the premises are destroyed by fire or other casualty. We may now assume the following varying sets of facts:

1. The residence is destroyed by fire before delivery of the deed and, of course, before payment of the balance of the purchase price. Is P liable for the balance of the price? May V recover \$50,000.00 from the insurance company (that sum being both the face amount of the policy and the actual value of the property), or will his maximum recovery be \$22,500.00, the balance of the purchase price? If he recovers from the company, will he hold the proceeds of the policy (whatever they may be) as a trustee for P's benefit? And should the consequences flowing from this transaction depend upon whether P has done everything entitling him to a deed (in this case the payment of the entire purchase price) or should they flow simply from the execution of the contract itself?

2. V dies shortly after the contract is made. At his death the deed has not been delivered and, of course, the balance of the purchase price has not been paid. V leaves no will, and is survived by W, and his brother, X, as his only heirs at law. He leaves no descendants. Are W and X or V's personal representative entitled to the benefit of the contract? If the balance of the purchase price goes to W and X as V's heirs, they will receive it in equal shares. If it goes to the personal

representative, the entire amount (after payment of expenses of administration and claims) will belong to W.¹

3. P dies shortly after the contract is made. At his death the deed has not been delivered and, of course, the balance of the purchase price has not been paid. P leaves no will, and is survived by W, and his brother, X, as his only heirs at law. He leaves no descendants. After payment of expenses of administration and claims against the estate, there is a balance of \$22,500.00 in cash in the administrator's hands. May X compel payment by the administrator of the balance of the purchase price with the cash in the administrator's hands, and then claim an undivided one-half interest in the residence?

4. Prior to the making of the contract, V had executed a will by which he devised the residence to W. Is the devise adeemed by the contract?²

5. Subsequent to the making of the contract, V executes a will devising all his right, title and interest in the premises to Z, and bequeathing his residuary estate to W. If P completes the transaction after V's death, by paying the balance of the purchase price, will Z be entitled to the proceeds of the sale, by virtue of the devise, or will the proceeds pass to W under the residuary clause of V's will?

6. Subsequent to the making of the contract, P executes a will whereby he devises all his real property to X and bequeaths all his personal property to Y. W predeceases P. Who is entitled to the residence under the will, X or Y?

7. At his death V owns another parcel of real estate, Whiteacre. His will directs his executor to sell Whiteacre and to pay the proceeds of the sale to V's son, Z. After V's death, but before Whiteacre has been sold, Z dies intestate, survived by his wife, W, and a brother. Is W entitled to all the proceeds of the sale, or is Z's brother entitled to half of them?

8. V bequeaths \$35,000 to T, as Trustee, with directions to pur-

¹ Under Section 11 of the Probate Act, ILL. REV. STAT. ch. 3, § 11 (1961), "When there is no descendant but a surviving spouse and also a parent, brother, sister, or descendant of a brother or sister of the decedent," the *entire* personal estate goes to the surviving spouse, but *one-half* of the real estate goes to such spouse and the other one-half to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion.

² "A testamentary gift of testator's specific real or personal property is adeemed, or fails completely, when the thing given does not exist as part of his estate at the time of his death." ATKINSON, WILLS § 134 (2d ed. 1953).

chase a residence for V's daughter, M, a widow. After V's death but before T has purchased the residence, M dies, leaving a will whereby she devises "all my real estate, wherever located, to my daughter X" and bequeaths "all my personal property of every kind to my son, Y." Who is entitled to the money in the hands of the trustee, X or Y?³

THE ORIGIN AND MEANING OF THE DOCTRINE OF EQUITABLE CONVERSION

The origin of the doctrine is uncertain and disputed.⁴ Cases expounding it can be found as early as 1678.⁵ The applicable principles "were developed in a single court—the English court of chancery—beginning early in the seventeenth century and reaching logical symmetry some two hundred years later in the decisions of Lord Eldon and the writings of Sugden."⁶

The premises on which the Court of Chancery proceeded became the basis for conclusions which, though strictly logical, were sometimes startling in their consequences. It has been said that this "corner of property law . . . has, like that which includes the classic learning as to contingent remainders and the Rule against Perpetuities, an almost mathematical atmosphere."⁷ But it is not possible to solve all problems involving equitable conversion by deductive reasoning. Here, as elsewhere, "[T]he life of the law has not been logic; it has been experience."⁸

Equitable conversion was defined in the early English case of *Fletcher v. Ashburner*⁹ as "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such."

³ Additional problems (particularly in the field of decedents' estates) will be explored in this article, but it is hoped that the problems posed above will serve to stimulate the reader's interest and whet his legal appetite.

⁴ Davis, *The Origin of the Doctrine of Equitable Conversion by Contract*, 25 KY. L.J. 58 (1936).

⁵ *Bubb's Case*, 2 Freeman 38, 22 Eng. Rep. 32 (1678).

⁶ Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract*: I, 44 YALE L.J. 559, 560 (1935).

⁷ *Ibid.*

⁸ HOLMES, *THE COMMON LAW* 1 (1881).

⁹ 1 Brown Ch. 497, 1 Lead. Cas. Eq. 4th Am. Ed. 1118 (1784).

Our Supreme Court adopted this definition verbatim in *Young v. Sinsabaugh*,¹⁰ adding:

It is an application of the maxim that equity regards that as done which ought to be done. An express declaration in the instrument that the land shall be treated as money, although not sold, or that the money shall be treated as land, although not actually laid out in the purchase of it, is not essential. The direction to convert may arise by necessary implication from the nature of the instrument or the language employed.

Pomeroy¹¹ states the elements of the doctrine clearly and succinctly:

One of the most direct and evident results of the principle [that "Equity regards as done that which ought to be done"] is the equitable property which arises from the doctrine of conversion,—when real estate is treated by equity as personal property, or personal estate as real property; land as money, or money as land, . . . A conversion may thus take place where, by a will, a deed, or family settlement, land is actually devised or conveyed, or money or securities are actually assigned to trustees, with directions in the one case to sell the land, and pay over the proceeds to the beneficiary, and in the other to invest the fund in the purchase of the land to be then conveyed to him; or it may in like manner take place where, by marriage articles or other executory agreement, land is covenanted to be conveyed, or money is covenanted to be assigned, in like manner and for like purposes. The effect of the conversion is a direct consequence of the principle in question. Personal estate becomes, to all intents and purposes, in the view of equity, real, and real estate personal. Money directed to be invested in land descends to the heir of the original beneficiary, or passes under a general description of real property in his will, while land directed to be converted into money goes to his personal representatives, or is included in a residuary bequest of his "personal property."

These rules have been applied by some courts with the precision of a mathematical equation. But just as a glance at the formula " $E = MC^2$ " does not give the "why" of relativity, so a glance at the consequences flowing from the equitable conversion of property does not tell us "why," as a matter of policy, such consequences are desirable. We shall examine here a substantial number of the cases in an attempt to discover the "why" underlying the rules; and we shall consider whether the rules as applied have had sensible results or whether they have been applied blindly and without meaning.

It should be observed at the outset that since equitable conversion is a creature of the Court of Chancery, the doctrine "has no application at law."¹² Thus, at law a contract for the sale of land has no

¹⁰ 342 Ill. 82, 85, 173 N.E. 784, 786 (1930).

¹¹ 2 POMEROY, EQUITY JURISPRUDENCE, § 371 (5th ed. 1941).

¹² Bouslough v. Bouslough, 306 Ill. 24, 137 N.E. 517, 518 (1922).

effect on the title. If there be a breach, the party not at fault may sue for damages. So long as the contract remains executory, the buyer has no property rights; he has only a contract right against the seller. Legal title passes when, and only when, a deed is delivered to and accepted by the buyer.

Nor does this doctrine have any application in a strictly statutory proceeding. In *Connell v. Crosby*,¹³ the State urged that the doctrine should be applied in determining inheritance tax liabilities. There the testator devised a life estate to his wife, and the remainder in trust, with directions to the trustee to convert the trust property, both real and personal, into money, and to devote a portion thereof to founding a college. Certain real estate so devised to the trustee was located outside the State of Illinois. If treated as realty, it was not taxable; if treated as personalty, it was. The State contended that since the trustee was directed to convert all the trust property into money, including the real estate located outside the State, it should all be treated as personal property. The court rejected this contention, saying:¹⁴

The will directs the conversion of the real estate into money for the purpose of creating a fund to be devoted to the establishment of the college, and it is argued that under the doctrine of equity the land is to be regarded as converted into personalty, and . . . that the bequest of the proceeds of the sale of the real estate is subject to the tax, as being personalty. The doctrine of equitable conversion is an outgrowth of the maxim of equity that in a court of equity that which ought to have been done is to be regarded as done. *The doctrine of equitable conversion is recognized in equity only, and is not given effect in courts of law. . . . It cannot be applied in proceedings for the collection of inheritance or succession taxes.*

That a court of law may look upon a transaction with one eye and view it from one aspect, and a court of equity may look upon the same transaction with another eye and view it from a different aspect is, of course, familiar to all students of Anglo-American jurisprudence. This dichotomy between law and equity—unique in our jurisprudence and unknown to the Continent—is a fact of life to all English and American lawyers.

Equity, treating as done that which ought to be done, takes the view that what would normally be considered realty is personalty and personalty realty. By the application of a fiction, the Chancellor

¹³ 210 Ill. 380, 390, 71 N.E. 350, 354 (1904).

¹⁴ *Id.* at 390, 71 N.E. at 354 (Emphasis added).

holds that a magic conversion has occurred; and that which to the eye of "outward seeming"¹⁵ appears to be *terra firma* is not *terra firma* at all; it is personalty.

We shall deal (in this and in a subsequent article) with the impact of the doctrine primarily in these areas: (1) conversion by contract for the sale of land; and (2) conversion by will or *inter vivos* trust instrument. Where the courts of this state have spoken in these areas we shall direct our attention principally to the Illinois decisions; where they have not, we shall consider cases from other jurisdictions.

We turn our attention here to equitable conversion by contract for the sale of land, and its effect (a) on the rights and obligations of the parties with respect to risk of loss and insurance coverage, and (b) on the devolution of the property upon the death of either the vendor or the purchaser, testate or intestate, before delivery of a deed. We shall turn our attention, in the later article, to equitable conversion by will or *inter vivos* trust agreement, and its effect on the devolution of property to (a) heirs at law and next of kin, (b) legatees and devisees, and (c) beneficiaries of trusts.

CONSEQUENCES OF CONVERSION BY CONTRACT

Justice Story, in discussing the application of the doctrine to contracts for the sale of land, said:

The true meaning of this maxim is that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed. . . . The most common cases of the application of the rule are under agreements.¹⁶

Lord Eldon first stated the doctrine in its modern form in *Seaton v. Slade*.¹⁷

The effect of a contract for purchase is very different at Law and in Equity. At Law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate *from the sealing of the contract* is the real property of the vendee. It descends to his heirs. It is devisible by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be discussed between the representatives of the vendee.¹⁸

He might well have added that it "may be discussed between the heirs and representatives of the vendor."

¹⁵ CARDOZO, J. in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁶ 1 STORY, *EQUITY JURISPRUDENCE* § 64g (11th ed. 1918).

¹⁷ 7 Ves. Jun. 265, 273 (1802).

¹⁸ *Ibid.* (Emphasis added).

Jessel, M. R. in *Lysaght v. Edwards*,¹⁹ in commenting on the consequences flowing from a specifically enforceable contract, said:

Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity.

A contemporary author²⁰ in the field of equity sums up the consequences of a contract for the sale of land on the devolution of property rights thus:

Since the purchaser now equitably owns realty, upon his death his rights in the property are realty and descend to those entitled to his realty, subject to the rights of the vendor under the contract. The vendor, on the other hand, now owns personalty, a chose in action for the payment of the rest of the purchase price, and on his death, those who take his personalty would succeed to the right to the payment of the rest of the purchase price. So far as concerns the legal title which he still holds as security and as a trustee, it passes to those who would succeed to his realty but they take it in turn as trustees, with the duty to transfer it to the contract purchaser at the time for performance of the contract.

Dean (later Chief Justice) Harlan F. Stone, in critically examining the fictional basis for the doctrine, said:²¹

The effect of the contract of sale of land has been stated to be that the vendor becomes a trustee of the land for the vendee and the vendee becomes a trustee of the purchase money for the vendor. While this statement contains a germ of truth, it is obviously inaccurate, because the vendor is unlike a trustee in many particulars. He has a personal interest in the land; he is entitled to its rents, issues and profits until the date of performance; he holds the title as security for the payment of the purchase price; the proceeds of the insurance effected by him he holds for his own benefit and not the benefit of the vendee. The vendee, on the other hand, is a mere debtor. He holds no specific property for the vendor, and his sole obligation in law and in equity is to pay the purchase money on the conveyance of the vendor's title.

In suggesting a rationale of his own—quite independent of the fiction of conversion—Stone continued:

More accurately stated, the obligation of the vendor in equity is to convey land to the vendee. The vendee is the owner of the correlative right in equity to have the vendor convey. . . . Since the vendee has an equitable right to call for a conveyance of the land, just as in the case of the law affecting the right of a *cestui que trust* of land, his right for purposes of devolution will be treated

¹⁹ L.R. 2 Ch. 499, 507 (1875).

²⁰ DEFUNIAK, *HANDBOOK OF MODERN EQUITY* 208 (2d ed. 1956).

²¹ Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 372-73.

as land. The vendee's equitable right, therefore, in equity passes to his heir or devisee and in jurisdictions where there is dower in an equitable right to land his widow is entitled to dower. . . . [T]he equitable right of the vendee to call for the land in the hands of the vendor should pass to the vendee's heirs, regardless of any theory of equitable conversion.

The result, therefore, is that . . . where both the vendor and the vendee are dead, the vendee's equitable right to the performance has descended to the heir, who has the right to specific performance. The obligation to convey, however, rests upon the vendor's heir, not because he is subject to obligations in contract, but because he is in the precise position of a donee of property held subject to an equitable obligation. He will not be permitted to retain the property in violation of that obligation any more than would a donee of trust property be permitted to retain it.

The right to receive the purchase money, however, has at law vested in the personal representative of the vendor, since the legal ownership of the contract, which is personal property, passes to the personal representative and not the heir; and since the proceeds of the vendor's contract, by specific performance, is money, which is personal property, there is no equitable principle by which the personal representative of the vendor can or should be deprived of the right to receive the purchase money.

And he concluded as follows:

The final result, therefore, of the specific performance of the contract for the sale of land after the death of the vendor and vendee will be that the vendee's heir will be entitled to the conveyance because he is the heir of the one equitably entitled to real estate. The vendor's heir must convey because he holds property subject to his ancestor's equitable obligation to convey, and he cannot be in a better position than a donee of such property. A conveyance cannot be had without payment of the purchase price to the vendor's personal representative, who is legally entitled thereto, and who is equitably entitled to the security of the legal title. The vendee's personal representative must pay the purchase price, not only because he is the only person obligated to pay, but because payment must be made in order to finally dispose of the equitable rights of the vendee's heir and the obligation of the vendor's legal representative. All four parties are therefore necessary parties to the action for specific performance, the vendor's heir to give title; the vendee's heir to receive the conveyance; the vendee's personal representative to pay the purchase price; and the vendor's personal representative to receive it.

It is thus apparent that a result is reached commonly explained by the doctrine of equitable conversion, which nevertheless may be reached quite independently of it, and which really bears no relation to the assertion that the "sealing of the contract" renders the land the property of the vendee and the purchase money the property of the vendor.

RISK OF LOSS

The principle of equitable conversion is perhaps most familiar to lawyers in this area: If, during the interval between contract and conveyance, the property is damaged or destroyed by fire, flood or

earthquake, who bears the burden of loss? If the property is taken by eminent domain, who receives the award? Who, in short, is the owner during the gap between contract and deed?

At law, the risk of loss traditionally has been placed on the vendor. On this point, Dean Langdell said:²²

If a contract be made for the purchase and sale of land which has buildings on it, and, after the making of the contract, but before the conveyance of the land, the buildings be casually destroyed by fire, upon whom will the loss fall? At law it will clearly fall upon the vendor in all cases.

In equity, however, the majority of courts have placed the risk on the purchaser;²³ but for these courts the most troublesome problem has been to determine *as of what moment* the risk passes from vendor to purchaser.

At least five different views have been advanced as to who should bear the burden of loss; and at least three of them have substantial support in the decisions:²⁴

(1) *The view most widely accepted is that the risk of loss is on the purchaser the moment the contract is signed.* The source of this doctrine is said to be *Paine v. Meller*,²⁵ but careful analysis will show that the case does not go that far. There the parties signed the contract on September 1st; the purchaser immediately made a deposit on account of the purchase price; and the vendor was to deliver the deed and the purchaser was to pay the balance of the purchase price on September 29th. On that date defects in title were discovered. The parties negotiated with respect to the defects, and they finally agreed upon a conveyance with a reduction in price. The vendor prepared the deeds, and on December 17th the parties were ready to consummate the transaction. On December 18th, before the deeds were delivered, the houses were burned. The vendor filed a bill in equity for specific performance. The Court held that (a) if the purchaser in fact accepted the title before the fire, the vendor was entitled to specific performance and (b) upon the conveyance being made, the purchaser's right to rents and profits would relate back to

²² LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 58 (2d ed. 1908).

²³ The cases are collected in Annot., 27 A.L.R. 2d 444 (1953).

²⁴ No attempt is made here to classify the decisions in the various states in detail. The cases are collected in annotations in 22 A.L.R. 575 (1923); 41 A.L.R. 1272 (1926); 46 A.L.R. 1126 (1927); 27 A.L.R. 2d 444 (1953). The Illinois decisions, of course, will be dealt with in this article at length.

²⁵ 6 Ves. Jun. 350, 31 Eng. Rep. 1088 (1801).

September 29th (the date on which the contract, by its terms, was to have been consummated). The Chancellor referred to a Master in Chancery the issue whether the purchaser had fully accepted the title. The Court said:

As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir.

From this case, most Courts have deduced the doctrine that the purchaser is the beneficial owner from the time the contract is made; but this conclusion is not warranted, either by what the Court *held* on the facts or by what it *said*. What *Paine v. Meller* actually stands for is this: Inasmuch as the parties were ready to consummate the transaction immediately before the casualty, the purchaser was regarded in equity as the owner and charged with the loss.²⁶ The risk of loss shifted to the buyer when the time fixed for performance, or later agreed upon, arrived, both parties being then ready to consummate the sale. Stated otherwise, *Paine* holds: If, at the time of the loss, the time had arrived for the parties to perform all acts required of them, and they were then ready to do so, but through some accident, mistake or delay, they did not perform, the purchaser will bear the burden of loss as though he had received the deed. At law, no effect can be given to the abortive attempt of the parties, or to such rights as would have accrued if the necessary acts had taken place; but in equity justice may be done by treating the case as though the transaction had been executed.²⁷

This first view, held by a majority of the states—that the purchaser, upon the signing of the contract, has “become in equity the owner of the premises” so that “they are his to all intents and purposes”²⁸—seems, on a *superficial* analysis, to apply the principle of equitable conversion with strict logic; but a more penetrating analysis, it is believed, will cause grave doubt as to the soundness of this view. In-

²⁶ For cases which have challenged the validity of the broad deduction made by most courts from *Paine v. Meller* see *Wicks v. Bowman*, 5 Daly 225 (N.Y., 1874) and *Good v. Jarrard*, 93 S.C. 229, 76 S.E. 698 (1912). See also 1 STORY, EQUITY JURISPRUDENCE § 82, et seq. (14th ed. 1918) and MERWIN, EQUITY § 124 (1895).

²⁷ Story gives many examples of the application of the maxim under these circumstances, among which is *Paine v. Meller* itself. See 1 STORY, EQUITY JURISPRUDENCE § 82, et seq. (14th ed. 1918).

²⁸ Lord Eldon, in *Paine v. Meller*, 6 Ves. Jun. 350, 352, 31 Eng. Rep. 1088 (1801).

asmuch as the principle of equitable conversion rests on the maxim that "equity regards as done that which *ought* to be done," the doctrine should be applied only when the vendor's obligation to convey has become fixed; and where the purchaser has not performed, either because the time for his performance has not arrived or for some other reason, no obligation devolves upon the vendor to convey.

(2) *A strong minority of American states, following an early Massachusetts decision,*²⁹ *hold that the risk of loss is on the vendor until legal title is conveyed.*³⁰ These states, therefore, regardless of how or whether they apply the principle of equitable conversion in other areas of the law, give no effect to the doctrine in determining risk of loss.

This view was stated with clarity in *Hawkes v. Kehoe*.³¹

We need spend no time upon the numerous cases in England and in this country . . . as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. . . . We are of opinion that in this commonwealth, when, as in this case, the conveyance is to be made of the whole estate, including both land and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject matter of the contract, it is now settled by the decision in *Wells v. Calnan*, 107 Mass. 514, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss; but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. . . .³²

There are decisions or *obiter dicta* in at least two of the states adopting this view which place the risk of loss on the vendor *even though the purchaser is in possession*.³³

²⁹ *Thompson v. Gould*, 37 Mass. 134 (1838). This case involved an action at law by the purchaser under an oral contract to recover a deposit, so that the actual decision is consistent with the majority rule. But there was a dictum to the effect that the same result would have been reached in equity if the contract had been in writing, and the later Massachusetts cases have adopted this view. See cases cited *infra*, footnote 32.

³⁰ See Note, 12 COLUM. L. REV. 257 (1912); Griffin, *Risk of Loss in Executory Land Contracts*, 4 NOTRE DAME LAW 506 (1929).

³¹ 193 Mass. 419, 424, 79 N.E. 766, 767 (1907).

³² See *Libman v. Levenson*, 236 Mass. 221, 128 N.E. 13 (1920) (holding that purchaser could rescind by bill in equity and recover his deposit); *Bissonnette v. Keyes*, 319 Mass. 134, 64 N.E. 2d 926 (1946) (to the same effect).

³³ *Cooper v. Huntington*, 178 Cal. 160, 172 Pac. 591 (1918) (installment contract); *Wong Ah Sure v. Ty Foot*, 37 Cal. App. 465, 174 Pac. 64 (1918); *La Chance v. Brown*,

(3) *The third view*, urged by Dean Langdell,⁸⁴ but for which there appears to be no support in the decisions, is that the risk of loss should be on the vendor until the time agreed upon for the conveyance of the legal title, and thereafter on the purchaser unless the vendor is then in such default as to be unable specifically to enforce the contract.

(4) *The fourth view*, advanced by Professor Williston's persuasive pen at an early date,⁸⁵ is that the risk of loss should be on the party in possession, whether vendor or purchaser. It has been said "that the purchaser is substantial owner of the property and should bear the burdens of ownership, while the purchaser out of possession is not substantial owner; this argument is supported by the decisions which make the right to rents and profits and the liability for taxes and other outgoings depend upon possession. Moreover . . . placing the burden of loss on the party in possession will put pressure on him to protect the property."⁸⁶

The importance attached to possession may be seen in this: Many Courts which have spoken—often rather loosely—about the risk of loss attaching to the purchaser upon the signing of the contract, have

41 Cal. App. 500, 183 Pac. 216 (1919). But see *Kelly v. Smith*, 218 Cal. 543, 551, 553, 24 P. 2d 471, 474, 476 (1933) (where the court refused to place the risk of loss on the vendor where the purchaser was in possession under an installment contract, thus apparently overruling *Cooper v. Huntington*, *supra*, and said: "Besides bearing in mind the great development of trade through the medium of such contracts . . . we ought to consider upon whose shoulders devolves the responsibility of so caring for the property that fire will not occur, and how improper care will contribute to the hazard thereof. . . . [W]here the vendee is in possession, enjoying the entire beneficial use of the property, having acquired an estate which he may convey or encumber, and which to all intents and purposes is his, the great majority of opinion holds that the loss should fall upon him, such being the manifest intent of the parties where title is retained solely as security. . . . And this result is arrived at not by the legerdemain involved in the doctrine of equitable conversion so much as it is by the contract and the manifest purpose of the parties.") And see *Ware v. Security-First Nat. Bank*, 7 Cal. 2d 604, 61 P. 2d 936 (1936) (holding that the loss should fall on the purchaser in possession under an installment contract because the contract of sale provided that the purchaser keep all buildings insured against fire, thereby evidencing an intention that the vendor should retain title only as security for the price). The vacillation in the California decisions should now be resolved by the courts in view of the adoption by that state of the Uniform Vendors and Purchasers Risk Act, discussed *infra*. See also *Wilson v. Clark*, 60 N.H. 352 (1880).

⁸⁴ LANGDELL, *A BRIEF SURVEY OF EQUITY JURISDICTION* 58 (2d. 1908).

⁸⁵ Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 HARV. L. REV. 106, 111, et seq. (1895). See also Notes, 6 MINN. L. REV. 513 (1922) and 2 WIS. L. REV. 174 (1923).

⁸⁶ Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L. J. 756, 757 (1935).

referred significantly to the fact that at the time of the loss the purchaser was in possession of the property.³⁷

The view that possession should be the criterion of risk culminated in the Uniform Vendors and Purchasers Risk Act,³⁸ which has been adopted in eight states.³⁹ This statute provides:

Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise: (a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; (b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid.

(5) *The fifth view*, advanced by some authors,⁴⁰ is "*that the burden of loss should be placed on the vendor unless there is something in the contract or in the relation of the parties from which the Court can infer a different intention.*" On this theory, possession "may or may not be a sufficient controlling element."⁴¹ This test would seem to be rather vague, and it has not received any avowed judicial acceptance; but it is not inconsistent with the decisions in those states which take the view that the burden of loss is on the vendor until he conveys, or with the decisions in those states which adopt possession as the test.

INSURANCE

No consideration of the problem of risk of loss would be adequate or realistic if it failed to take into account the matter of insurance. Most cases of damage during the interval between contract and conveyance involve fire losses which are covered by insurance. Whether

³⁷ See, e.g., *Anderson v. Yaworski*, 120 Conn. 390, 181 A 205, 101 A.L.R. A.1232 (1935) and *Smith v. Phoenix Insurance Co.*, 91 Cal. 323, 27 Pac. 738 (1891).

³⁸ 9c U.L.A. 313, 314 (§ 1).

³⁹ Not in Illinois. The statute has been adopted in California, Hawaii, Michigan, New York, North Carolina, Oregon, South Dakota and Wisconsin.

⁴⁰ Vanneman, *Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title*, 8 MINN. L. REV. 127 (1924); 6 CORN. L. Q. 111 (1920); 79 U. OF PA. L. REV. 239 (1930).

⁴¹ Vanneman, *supra*, footnote 40, at 143.

the vendor or purchaser is to bear the burden of the loss *should* determine how and by whom insurance against fire is to be effected. It *may* also determine how the insurance proceeds received by a party to the contract are to be distributed.⁴² We turn now to the Illinois cases to determine how the courts of this state have dealt both with the problem of risk of loss and the matter of insurance.

Few cases in this area of the law have had facts as unusual or problems as intriguing as the recent case of *First National Bank of Highland Park, as Trustee, v. Boston Insurance Co.*⁴³ There V, holding title as trustee under a land trust, insured a residence with four companies, in the aggregate amount of \$46,750. Each policy indemnified the insured "to the extent of the actual cash value of the property at the time of loss but not exceeding the amount which it would cost to repair or replace the property with material of a like kind and quality within a reasonable time after such loss . . . nor in any event for more than the interest of the insured, against all direct loss by fire."

V then entered into a contract to sell the property to P for \$19,000. P paid \$1,000 as earnest money and \$2,000 shortly thereafter. The balance of \$16,000 was due six months after the date of the contract. The contract provided that premiums on the policies were to be prorated as of the date of the delivery of the deed and that the policies would then be assigned to P. It also provided, "If, prior to delivery of deed hereunder, the improvements on said premises shall be destroyed or materially damaged by fire or other casualty, this contract shall, at the option of buyer, become null and void."

P did not take possession of the property. The parties had agreed, however, that he could decorate the premises with a view to occupancy upon consummation of the sale.

Before the balance of \$16,000 was due or had been paid the building was totally destroyed by fire. Appraisals secured by the insurance adjusters showed that reproduction costs would total \$238,157.⁴⁴

⁴² The same principles, of course, would be applicable to other insured losses; and cases involving, e.g., tornado insurance and flood insurance, may well arise.

⁴³ 17 Ill. App. 2d 159, 149 N.E. 2d 420 (1958), *aff'd*, 17 Ill. 2d 147, 160 N.E. 2d 802 (1959).

⁴⁴ This is not a typographical error. The opinion gives no hint as to why V contracted to sell property having a replacement cost of \$238,157, and covered by fire insurance amounting to \$46,750, for the sum of \$19,000. Inquiry of counsel in this case discloses, however, that V had a good business reason for making this sale.

The companies conceded that the value of the property at the time of the fire was substantially in excess of the insurance coverage. However, they "took the position that . . . plaintiff's insurable interest did not exceed \$16,000, the unpaid balance due under the contract;"⁴⁵ and they tendered this amount to V. Their theory, of course, was that prior to the fire V's interest had been converted into personalty, and that the *measure* of that interest (and therefore the measure of the loss for which it could be indemnified) was the unpaid balance of the purchase price.

V, of course, refused the tender and brought suit. It contended that the measure of its loss was the value of the *building*, not exceeding, of course, the amount of the coverage; and it argued that the companies had no right to profit from the fact that V, for reasons of its own, had elected to sell the premises for an amount grossly under their true value. The companies, V urged, were not entitled to such a windfall.

From a judgment in V's favor for \$46,750, the full amount of the policies, the companies appealed.

The Appellate Court was confronted with two questions: (1) What was the *nature* of V's interest at the time of the fire? (2) What was the *measure* of that interest and of V's loss?

The answer to the first of these questions depended, of course, on whether an equitable conversion had occurred. On this point, the Court said:⁴⁶

. . . It should be noted at the outset that we are not here concerned with any change of interest or title effected by the . . . contract . . . *Illinois followed the legal title theory and rejected the equitable conversion theory in Budelman v. American Insurance Co.*, 297 Ill. 222 . . . *holding the law to be well settled in this State that an executory contract for the conveyance of real property does not convey either the legal or equitable title to the vendee, and it is only when the vendee performs all acts necessary to entitle him to a deed that he acquires an equitable title and may compel a conveyance.*

On the second question, the Court, having stated the defendants' contention succinctly:⁴⁷

The paramount question . . . is the measure of plaintiff's loss. Defendants take the position that fire insurance policies are contracts for indemnification; that plaintiff's interest in the property at the time of loss, and hence the limit of its

⁴⁵ 17 Ill. App. 2d 159, 163, 149 N.E. 2d 420, 422 (1958).

⁴⁶ *Id.* at 165, 149 N.E. 2d at 422, 423 (Emphasis added). This statement is discussed at length at p. 20, et seq. *infra*.

⁴⁷ *Id.* at 164, 149 N.E. 2d at 422.

right of indemnification, is represented by the amount of the balance then due under the outstanding partially executed sales contract—\$16,000; that upon receipt of this payment, . . . plaintiff will have recovered its loss and been fully indemnified; and that the principle and purpose of insurance was thereby fully satisfied.

rejected the contention in forthright fashion:⁴⁸

. . . The principle to be adduced [from the texts and decisions] is that such policies are not contracts to insure property against fire, but to insure the owner of the property against loss by fire; that destruction by fire . . . is not the contingency upon which the insurer promises to indemnify the insured—it is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of indemnity. The policies . . . limit the insured's recovery . . . to its interest in the premises. The pertinent inquiry is to determine the extent of the interest . . . which is the object of indemnification. . . .

Under the policies . . . defendants insured plaintiff 'to the extent of the actual cash value of the property . . . but not exceeding the amount which it would cost to repair or replace the property . . .' It is admitted that the loss to the . . . premises exceeded the insurance in force. How then is the interest of the insured and the actual cash value to be determined? Certainly not by the sales value, which is a different thing, or by what one is willing to accept for the sale of the property immediately preceding the destruction thereof by fire.

The Court concluded that the defendants were liable in the full amount of the policies, and affirmed the judgment of the trial court, saying:⁴⁹

. . . Conceivably, there may be many situations in which an owner of property may be willing to sell for less than the cash value; his need for ready cash; his disinclination to wait for an advantageous offer because of the attendant inconveniences during the waiting period; his wish to benefit an individual or an institution by donating the property to the beneficiary, or selling it under the market value. We feel that in any of these, or similar circumstances, the insurance company would have no right to appropriate to itself the difference between the actual cash value, which represents the loss for which the insured paid premiums, and the lesser amount, for which the sale was made.⁵⁰

⁴⁸ *Id.* at 166, 149 N.E. 2d at 423.

⁴⁹ *Id.* at 170, 149 N.E. 2d at 425.

⁵⁰ Cf. *Dubin Paper Co. v. Insurance Co. of North America*, 361 Pa. 68, 63 Atl. 2d 85 (1949) and *Milwaukee Mechanics Insurance Co. v. Maples*, 37 Ala. App. 74, 66 So. 2d 159 (1953), both of which were relied upon by the Appellate Court. *Dubin* is especially interesting on its facts. There, V contracted to sell improved real estate to P for \$25,000. Thereafter, before the sale was consummated, P obtained fire insurance policies totaling \$25,000 in his own name. At the time the contract was signed, V had fire insurance coverage, in his own name, with one company, for \$23,500. He increased this policy to \$33,500 after the contract was signed. He also had fire insurance coverage for \$3,000 with another company. Thus, before the fire, the aggregate coverage carried by V and P was in the amount of \$61,500. The property was damaged by fire to the extent of \$49,353. Thereafter the sale was consummated. P collected \$25,000 on his own policy, and then brought suit to compel the insurance companies to pay the coverage under the

The opinion of the Appellate Court was bottomed on a premise which it stated unequivocally—that “Illinois followed the legal title theory and rejected the equitable conversion theory in *Budelman v. American Insurance Co.*, 297 Ill. 222 . . . holding the law to be well settled in this state that an executory contract for the conveyance of real property does not convey either the legal or equitable title to the vendee, and it is only when the vendee performs all acts necessary to entitle him to a deed that he acquires an equitable title and may compel a conveyance.”⁵¹

Whether this premise was sound we shall consider presently. The Supreme Court affirmed the decision of the Appellate Court; but it did not deem it necessary to pass on the validity of the premise. It reached the same conclusion by a different route: It held that whatever effect the doctrine of equitable conversion might have had on the rights and obligations of the parties to the contract, it could not affect the rights and obligations of others. The Court said:⁵²

The problem that the case presents is not an easy one. When insured property is in a single ownership, it is not hard to hold to the orthodox concept of an insurance contract as a personal contract of indemnity. But there are inherent difficulties when there are multiple interests in the property. Those inherent difficulties are augmented because the effect given to an executory contract to sell realty, and to the doctrine of equitable conversion, differs significantly from one jurisdiction to another. The result is that neither courts nor commentators are agreed upon proper solutions for the many variations on the vendor-vendee-insurer theme . . .

As we see it there are several difficulties with the position of the insurers. In the first place, it transplants the doctrine of equitable conversion into an area where it does not belong. *That doctrine was evolved in order to carry out the intention of the parties to the contract. To that end it acts upon the rights of the parties to the contract and those who claim under them. But it has frequently been held and stated that it should have no effect upon the rights of others.* Pomeroy states the limitation in these terms: ‘The doctrine seems to be correctly formulated by saying that the effects extend only to those persons who claim or are entitled to the property under or through the instrument or directly from or under the author of the instrument. Some of the cases definitely hold that a conversion takes place no further than is necessary for

policies issued to V. The companies contended that after the contract of sale was signed V's coverage was limited to the balance of the purchase price and that inasmuch as this balance had been paid, V had suffered no loss. The Court held otherwise, expressing the opinion that the companies erred in their interpretation of the word “loss”—that the loss “which [they] contracted to pay to the owner . . . is the actual worth in money of that building before it was destroyed.”

⁵¹ 17 Ill. App. 2d at 165, 149 N.E. 2d at 422, 423 (1958) (Emphasis added).

⁵² 17 Ill. 2d 147, 150, 160 N.E. 2d 802, at 804 (Emphasis added).

the purposes of the will or other instrument.' Pomeroy, *Equity Jurisprudence*, 5th ed. sec. 1166; cf. *Smith v Smith*, 174 Ill. 52, 59, 50 NE 1083.

The Court concluded with this interesting observation:⁵³

One other point should be mentioned. In response to questions from the bench during the oral argument in this court, counsel for the insured stated that the insured was obligated to account to the purchasers with respect to the insurance proceeds.⁵⁴ Counsel for the insurers complained that this had not been previously revealed, and both parties were allowed to submit supplemental briefs on the effect of this statement.

... The contract of sale gave the buyers the option to cancel the contract if the building was destroyed or materially damaged by fire. That contingency occurred, and we do not see how the way in which the contracting parties have dealt with the resulting situation can be a matter of concern to the insurers.

The respective positions, then, of the two courts of review may be thus summarized: The Appellate Court held that an equitable conversion had not occurred because the vendee had not performed "all acts necessary to entitle him to a deed"—the payment of the balance of the purchase price. The Supreme Court thought it unnecessary to pass on this question: It held simply that, irrespective of how or whether the doctrine might apply as between vendor and purchaser, "it should have no effect upon the rights of others" and therefore the insurance companies could not rely upon it.

⁵³ *Id.* at 154, 160 N.E. 2d at 806.

⁵⁴ How this obligation arose does not appear from the opinion. Suppose V recognizes no such obligation to P, that the contract is silent on the matter of insurance and risk of loss, that the policies have not been assigned to P, and that the jurisdiction holds that the burden of the loss is on P. Can V collect and keep the insurance proceeds and still hold P for the full balance of the purchase price? Or is P entitled to have the insurance proceeds credited against the unpaid balance? And if P has already paid the unpaid balance, can he charge V as constructive trustee with respect to the insurance proceeds in V's hands? The traditional English view was that insurance was personal to the vendor and that the purchaser had no claim to the proceeds even though he bore the risk of loss. See *Rayner v. Preston* (1881, Eng.) 18 Ch. Div. 1. *Accord*: *Brownell v. Board of Education*, 239 N.Y. 369, 146 N.E. 630 (1925). This rule was changed in England by an Act of Parliament (15 Geo. V, c. 20, s. 47 (1925)). A minority of American jurisdictions still follow the old English view which denies any part of the insurance proceeds to the purchaser. The cases are collected in *Annot.*, 64 A.L.R. 2d 1402 (1959). The courts of this state have not dealt with the problem definitively. See dictum in *Budelman v. American Insurance Co.*, 297 Ill. 222, 225, 130 N.E. 513, 514 (1921): "... the proceeds of the insurance are impressed with a trust which a court of equity will compel him [the vendor] to execute." For an excellent discussion of the rights of vendor and purchaser in insurance proceeds, see Cribbet, *Insurance and the Executory Contract for the Sale of Real Estate*, PROCEEDINGS OF SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, AMERICAN BAR ASSOCIATION, PART II, REAL PROPERTY LAW DIVISION, p. 3, et seq. (1961). Cf. *Zenor v. Hayes*, 228 Ill. 626, 81 N.E. 1144 (1907) (holding that the vendee had an insurable interest in the property, that such interest was protected after assignment of the policy to the vendee, and that he was entitled to the insurance proceeds).

The Appellate Court's unequivocal statement as to the Illinois law⁵⁵ would seem, on close scrutiny, to be self-contradictory. The *legal title* theory (followed in some states)⁵⁶ is that, for purposes of risk of loss, no title, *legal or equitable*, passes to the purchaser until *execution and delivery* of a deed. Illinois could hardly follow this theory and still hold that equitable title vests in the purchaser when he "performs all acts necessary to *entitle* him to a deed." What the Court obviously meant to say is that equitable conversion *does* occur but only when the vendee has fully performed.

A more troublesome problem, however, is presented by the Court's assertion that it is "well settled in this State" that equitable title does not vest in the purchaser until he "performs all acts necessary to entitle him to a deed." True, *Budelman v. American Insurance Co.*,⁵⁷ upon which the Court relies for this assumption, states this to be the law; but it is believed that this has *never* been the law of this state, and as we shall presently see, the matter has been laid to rest by a decision rendered by the Supreme Court as this article is about to go to press.⁵⁸

In *Budelman* the facts were these: V insured his dwelling against fire in the amount of \$1,700. The policy provided:

This entire policy . . . shall be void if any change other than by the death of an insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) . . . by voluntary act of the insured or otherwise.

Thereafter V contracted to sell the property to P on an installment basis (the familiar Articles of Agreement for Warranty Deed). The contract "contained the usual provisions . . . that the vendor would convey the property by warranty deed after the vendee had made the payments in accordance with the contract, and . . . that a failure

⁵⁵ 17 Ill. App. 2d 159, 165, 149 N.E. 2d 420, 423 (1958): "Illinois followed the legal title theory and rejected the equitable conversion theory in *Budelman v. American Insurance Co.*, 297 Ill. 222, 130 N.E. 513 (1921) (cited and discussed by both counsel), holding the law to be well settled in this state that an executory contract for the conveyance of real property does not convey either the legal or equitable title to the vendee, and it is only when the vendee performs all acts necessary to entitle him to a deed that he acquires an equitable title and may compel a conveyance."

⁵⁶ See authorities cited in footnotes 29 and 30 *supra*.

⁵⁷ 297 Ill. 222, 130 N.E. 513 (1921).

⁵⁸ *Shay v. Penrose*, No. 37026, decided by the Supreme Court of Illinois on September 28, 1962. As of this writing, the case is not yet reported. The time for filing a petition for rehearing, however, has expired, and inquiry of counsel discloses that no such petition has been filed. See pp. 25, 30-31 *infra*.

to make the payments would . . . forfeit all payments theretofore made and all rights of the vendee in the property."⁵⁹ The contract was silent on whether V or P was to have possession of the premises. V did enter into possession, however, and continued to live on the premises until they were damaged by fire.

V brought suit on the policy; and the insurer denied liability on the ground, *inter alia*, that "there had been a change of interest . . . within the meaning of the policy." This contention, of course, was based on the premise that the contract had caused an equitable conversion, resulting in the vesting of the title, in equity, in P. On this point, however, the Court said:⁶⁰

'Interest,' as used in the alienation clause of this policy, means *legal* interest, and therefore is retained by the party holding the legal title.

The Court also made this assertion:⁶¹

The law is well settled in this State that an executory contract of sale does not convey title to the vendee. The vendor retains the legal title and the vendee does not even take an equitable title. (*Chappell v. McKnight*, 108 Ill. 570; . . .)

When the vendee performs all acts necessary to entitle him to a deed, then, and not until then, he has an equitable title and may compel a conveyance. So it has been held in this State that, since a vendee has neither legal nor equitable title, the provisions of an insurance policy forbidding a change of title are not violated by entering into the ordinary contract for a deed. . . . In an action at law the vendor, being the holder of the legal title, is regarded as the sole and unconditional owner of the property, although the property in his hands or the proceeds of the insurance are impressed with a trust which a court of equity will compel him to execute. (*Security Ins. Co. v Kuhn*, 207 Ill. 166). The risk of the property remains with the title, and the contract is personal with the vendor, the loss or destruction of the property falling upon him as the owner.

On analysis, the statement in *Budelman* that an equitable title vests in the vendee when he "performs all acts necessary to entitle him to a deed" is clearly *obiter dictum*; for the Court having concluded that "'interest,' as used in the alienation clause of this policy, means *legal* interest," everything that it said about the point of time at which the *equitable* title vests in the purchaser was unnecessary to the decision.

In discussing the problem of equitable conversion and risk of loss, the Court said:⁶²

. . . The courts of some States . . . have adopted the rule that the term 'title' in the alienation clause of insurance policies refers to either legal or equitable title.

⁵⁹ *Budelman v. American Ins. Co.*, 297 Ill. 222, 224, 130 N.E. 513 (1921).

⁶⁰ *Id.* at 224, 130 N.E. at 514. (Emphasis added.)

⁶¹ *Id.* at 225, 130 N.E. at 514.

⁶² *Id.* at 226-27, 130 N.E. at 514.

. . . It will be seen that this line of decisions is in direct conflict with the settled law of this State. In the states where this theory prevails it is held that the loss in case of fire falls on the vendee, the holder of the equitable title, and for that reason they hold that a policy similar to the one before us insuring the vendor is forfeited where the vendee enters into possession of the property under an executory contract of sale. . . . In this State the loss in case of fire falls on the vendor, the holder of the legal title, who accordingly must apply any insurance he receives to the re-building of the premises. Being responsible for the delivery of the premises when the vendee complies with the terms of the contract, his interest in the property is not lessened, and by permitting the vendee to occupy the property he does not lose his legal title, interest or possession. . . .

A few months after the decision in *Budelman*, the Supreme Court decided *Knights v. Knights*.⁶³ There W, a widow, brought suit to establish homestead, dower and other rights in certain land, charging that her deceased husband, D, had attempted to deprive her of these rights by fraud. D had caused the title in the land, when acquired, to be conveyed to X. The Court held that an *equitable* title had vested in D *upon the making of the contract for the purchase of the land*, and that therefore W was entitled to assert homestead and dower rights in the property. The Court said:⁶⁴

. . . The situation presented . . . requires the application of the doctrine of equitable conversion. When a valid, enforceable contract has been entered into for the sale of real estate, as between the vendor and vendee equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money. The vendor is regarded as the trustee of the naked legal title for the benefit of the vendee, and the vendee is the trustee of the purchase money for the benefit of the vendor. *Therefore . . . D was the equitable owner of the real estate in question after the contract of sale was entered into. . . .*

This statement in *Knights* must also be regarded as *obiter dicta*. Since the *legal* title was in fact conveyed to X on a secret trust for D's benefit, the consideration for the transfer having been paid by D, it is clear that D was the beneficiary of a resulting trust and therefore the equitable owner of the property;⁶⁵ and inasmuch as W's homestead and dower rights attached, in any event, to the equitable title of D as the beneficiary of a resulting trust, what the Court *said* about the equitable title vesting in D immediately upon the making of the contract was unnecessary to the decision.

⁶³ 300 Ill. 618, 133 N.E. 377 (1921).

⁶⁴ *Id.* at 622, 133 N.E. at 378. (Emphasis added.)

⁶⁵ "[I]t is well settled that a resulting trust arises where a transfer of property is made to one person and the purchase price is paid by another." 4 SCOTT, TRUSTS § 440 (2d ed. 1956).

In any event the *dicta* in *Knights*—that the equitable title vested in the purchaser immediately upon the making of the contract—was in sharp contrast to the *dicta* in *Budelman*—that equitable title does not vest in the purchaser until he performs all acts necessary to entitle him to a deed. The contrast becomes even sharper when it is noted that: (a) both cases were decided by the same Court; (b) they were decided within a few months of each other; (c) both opinions were written by the same Justice; (d) both were concurred in by all the Justices; and (e) *Budelman* was not even mentioned in *Knights*.

Moreover, the Appellate Court in *First National Bank of Highland Park v. Boston Insurance Company*⁶⁶ did not mention *Knights*. It rested its conclusion that the law is “well settled in this State that an executory contract does not convey either the legal or equitable title to the vendee, and it is only when the vendee performs all acts necessary to entitle him to a deed that he acquires an equitable title” solely on *Budelman*.

The fact is that the decisions of our Supreme Court prior to *Shay v. Penrose*, just decided,⁶⁷ were in sharp conflict on the question as to *when* equitable conversion occurs. They seemed to agree that no conversion will occur unless the contract is binding and capable of forming the basis of a suit for specific performance.⁶⁸ They parted company on the issue whether the contract itself effects a conversion or whether the conversion occurs when the purchaser has done all acts necessary to entitle him to a deed.

Some early decisions in this state held that no equitable conversion could occur unless the purchaser had performed all acts necessary to entitle him to a deed. The leading case for this proposition is *Chappell v. McKnight*.⁶⁹ There the Court said:⁷⁰

⁶⁶ 17 Ill. App. 2d 159, 149 N.E. 2d 420 (1958), *aff'd*, 17 Ill. 2d 147, 160 N.E. 2d 802 (1959).

⁶⁷ No. 37026, Ill. Sup. Ct., Sept. 28, 1962. See note 58 *supra*.

⁶⁸ *Masters v. Masters*, 325 Ill. 429, 438, 156 N.E. 481, 484 (1927): “In order to work a conversion the contract must be such that a court of equity can specifically enforce it against an unwilling purchaser.” *First Nat'l Bank of Highland Park v. Boston Ins. Co.*, 17 Ill. 2d 147, 151, 160 N.E. 2d 802, 805 (1959): “Equity regards as done that which should be done, and so provides for the specific performance of a land contract.” See also *Rodisch v. Moore*, 266 Ill. 106, 107 N.E. 108 (1914), and *Sutherland v. Parkins*, 75 Ill. 338 (1874). And see 4 POMEROY, EQUITY JURISPRUDENCE § 1161 (5th ed. 1941): “In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.”

⁶⁹ 108 Ill. 570 (1884).

⁷⁰ *Id.* at 575.

A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance. . . . When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that he only has a contract for a title when he performs his part of the agreement.

The vitality of *Chappell* as an authority has been surprising. Although the majority of cases in this state have held that a conversion takes place the moment a valid and enforceable contract is entered into,⁷¹ *Chappell*, like an unwelcome guest, has appeared on the scene at most unexpected times. The result has been confusion and chaos in the cases. Thus, *Chappell* was the basis for the decision of the Supreme Court in *Budelman v. American Insurance Co.*,⁷² and *Budelman*, in turn, was the basis for the unequivocal statement of the Appellate Court in *First National Bank of Highland Park v. Boston Insurance Co.*⁷³ that it is "well settled in this State that it is only when the vendee performs all acts necessary to entitle him to a deed that he acquires an equitable title."⁷⁴

The survival of *Chappell* in the face of numerous later decisions taking a contrary view is all the more surprising when one considers that the case is not a *holding* for the point for which it is cited. *Chappell* involved an action in ejectment; and as we have seen,⁷⁵ conversion is an equitable doctrine and has no application at law. Moreover, the issue was whether the purchaser had a right to possession prior to the completion of the payments due under the contract, the contract

⁷¹ *Smith v. Smith*, 340 Ill. 34, 172 N.E. 32 (1930); *Knights v. Knights*, 300 Ill. 618, 133 N.E. 377 (1921); *Ward v. Williams*, 282 Ill. 632, 118 N.E. 1021 (1918); *Rhodes v. Meredith*, 260 Ill. 138, 102 N.E. 1063 (1913); *Lewis v. Shearer*, 189 Ill. 184, 59 N.E. 580 (1901); *Fuller v. Bradley*, 160 Ill. 51 (1895); *Buck v. Eaman*, 18 Ill. 529 (1857). *Baldwin v. Pool*, 74 Ill. 97 (1874): "What were the rights of [the parties] after the sale and while the purchaser was in possession under the contract? [The vendor] held the naked legal title while the equity was in the purchaser. She was, in equity, the owner, subject to the lien of [the vendor] for the balance of the unpaid purchase money."

⁷² 297 Ill. 222, 130 N.E. 513 (1921).

⁷³ 17 Ill. App. 2d 159, 149 N.E. 2d 420 (1958), discussed *supra* in text at note 43.

⁷⁴ *Id.* at 165, 149 N.E. 2d at 423. *Chappell* is also relied upon in *Gall v. Stoll*, 259 Ill. 174, 180, 102 N.E. 225, 227 (1913): "[N]o title, legal or equitable, vested in [the purchaser] by virtue of that agreement. It might have ripened into an equitable title upon his making the payments necessary to entitle him to a deed . . . and until that had been done he had no title to or interest in the land."

⁷⁵ See *Connell v. Crosby*, 210 Ill. 380, 71 N.E. 350 (1904), and the text accompanying note 12 *supra*.

being silent on that point. Even if the purchaser did have equitable title, he would not necessarily be entitled to possession; and the statement in *Chappell* was *obiter dicta*, not being necessary to the decision of the case.

The conflict in the cases appears now to have been resolved by the case of *Shay v. Penrose*.⁷⁶ There the Court made this forthright statement:⁷⁷

We would be less than candid if we said that this court has been consistent in applying the doctrine. Much of the confusion in this area arose from language in the early case of *Chappell v. McKnight*, 108 Ill. 570. It was there said that the contract to convey at a future time did not create an equitable title and that the buyer's estate would not ripen into an equitable title until he had performed all acts necessary to entitle him to a deed. While the *Chappell* case was one at law (ejectment) and therefore the equitable doctrine did not apply, nevertheless, it was cited with approval in some subsequent equity cases. (See, e.g., *Walters v. Walters*, 132 Ill. 467; *Gall v. Stoll*, 259 Ill. 174) *We believe the correct view to be that expressed in the majority of the cases which hold equitable conversion takes place at the instant a valid and enforceable contract is entered into and that the buyer at that time acquires an equitable title. To the extent that the Chappell case and those following it are inconsistent with this view they are hereby expressly overruled.*⁷⁸

RIGHTS OF CREDITORS

To what extent may the respective interests of the vendor and purchaser be subjected to the claims of creditors? The problems here are concerned primarily with the judgment lien.

At common law "the land of a judgment debtor could not be reached by his creditors to satisfy their claims."⁷⁹ The noted English legal historians, Pollock and Maitland, put it succinctly:⁸⁰

When judgment has been given for a debt, the sheriff will be directed to cause the sum that is needful to be made . . . out of the goods and chattels of the defendant, or levied . . . out of his goods and the fruits of his land. But our common law will not seize his land and sell it or deliver it to the creditor; seignorial claims and family claims have prevented men from treating land as an available asset for the payment of debts.

⁷⁶ No. 37026, Ill. Sup. Ct., Sept. 28, 1962. See note 58 *supra*.

⁷⁷ Emphasis added.

⁷⁸ The facts of this case are discussed, and an attempt made to appraise the impact of the decision itself, *infra*, at pp. 30-31.

⁷⁹ Kratovil & Harrison, Jr., *Enforcement of Judgments Against Real Property* 1951 U. ILL. L. F. 1.

⁸⁰ 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 596 (Lawyers' Literary Club) (2d ed. 1959).

Acts of Parliament gradually changed the rule.⁸¹ Today by statute, both in England and in this country, judgment creditors may subject the lands of their debtors, not exempt as a homestead, to sale for the satisfaction of their judgments.

The statutory basis for the creditor's rights against his debtor's lands has often been noted by our Supreme Court. In *Smith v. Toman*⁸² the Court said:⁸³

A judgment did not create a lien upon the real estate of the debtor at common law. . . . A judgment lien is purely a creature of the statute. *Sapp v Wightman*, 103 Ill. 150; *Noe v Moutray*, 170 Ill. 169, 48 NE 709; *Cooke v Avery*, 147 U.S. 375.

Statutes creating such a lien have been in existence in this state since 1825.⁸⁴

Section 1 of our present statute (the Act on "Judgments, Decrees and Executions")⁸⁵ provides that, except as to property registered under the Torrens Act, "a judgment of a court of record shall be a lien on the *real estate* of the person against whom it is obtained, situated within the county for which the court is held, from the time the same is rendered or revived, for the period of seven years, and no longer."

Section 3 of the Act defines real estate to include ". . . lands, tenements, hereditaments, and all legal and *equitable rights and interests therein and thereto*." If, therefore, the purchaser acquires an equitable title to or "interest" in the land under the conversion doctrine, a judgment against him should become a lien thereon, and such title or "interest" should be subject to sale. In *Gorham v. Farson*⁸⁶ the Court held that a judgment obtained against the purchaser before the contract was made "attached the moment that [the purchaser] obtained his interest, i.e. the moment that the agreement was made."⁸⁷

Clearly the judgment lien attaches only to the purchaser's interest; and inasmuch as the creditor's rights can be no greater than those of his debtor (a) the lien is extinguished when the vendor forfeits the

⁸¹ 3 FREEMAN, EXECUTIONS § 371 (3d ed. 1900); Loyd, *Executions at Common Law*, 62 U. PA. L. REV. 354, 362 (1914).

⁸² 368 Ill. 414, 14 N.E. 2d 478.

⁸⁴ Illinois Laws 1825, at 151.

⁸³ *Id.* at 417, 14 N.E. 2d at 480.

⁸⁵ ILL. REV. STAT. ch. 77 (1961).

⁸⁶ 119 Ill. 425, 431, 10 N.E. 1, 5 (1887).

⁸⁷ *Contra*, *Carbine v. Morris*, 92 Ill. 555 (1879); *Hatch v. Wagner*, 15 Ill. 127 (1853); (both holding the purchaser's interest not subject to execution until the purchase price was paid in full and the purchaser was entitled to specific performance).

purchaser's rights or rescinds the contract because of the purchaser's default⁸⁸ and (b) the lien is inferior to the lien of the vendor as security for the balance of the purchase price.⁸⁹

A judgment entered against *the vendor* before the contract is made will, of course, have priority over the purchaser's rights.⁹⁰

A judgment entered against the vendor *after* the contract is made will create a lien against his interest in the property. This "interest" is the legal title which he holds in trust for the vendee under the conversion doctrine; and the rights of such a creditor will necessarily be subject to those of the purchaser, provided he had notice, actual or constructive, of the purchaser's rights. To what extent, if at all, the purchaser must take cognizance of the judgment, whether the docketing of the judgment itself constitutes constructive notice to the purchaser, and similar questions are beyond the purview of this article. They have been discussed in scholarly fashion elsewhere and need no elaboration here.⁹¹

DEVOLUTION OF PROPERTY UPON DEATH OF VENDOR OR PURCHASER

Under the common law canons of descent,⁹² real property "descended," upon the death of the ancestor, immediately to his heir. Personal property, however, passed to the personal representative for payment of debts and ultimately for "distribution" to the next of kin.⁹³

The course of descent of real property was determined not by legislation but by judicial precedent; and under the feudal principle of primogeniture, one was survived not by "heirs" but by a single "heir" (the eldest son if the decedent was survived by children). No court, however, "administered" the real estate; the title of the heir, if challenged, was established in an action of ejectment at law.

At an early date (perhaps by the time of Magna Carta, 1215) the

⁸⁸ *Hayes v. Carey*, 287 Ill. 274, 122 N.E. 524 (1919); *National Bank v. King*, 110 Ill. 254 (1884); *Alexander v. Tams*, 13 Ill. 221 (1851).

⁸⁹ *McLaurie v. Barnes*, 72 Ill. 73 (1874).

⁹⁰ *In re Buchner*, 205 Fed. 454 (7th Cir. 1913).

⁹¹ See *Kratovil & Harrison, Jr., Enforcement of Judgments Against Real Property*, 1951 U. ILL. L. F. 1, 22, 23; *Legislative Changes in the Law of Equitable Conversion by Contract*: I, 44 YALE L. J. 559, 577 (1935); *Colvin, A Reconciliation of Priorities Under Executory Contracts for the Sale of Land*, 20 WASH. L.R. 159, 161 (1945).

⁹² See 2 BLACKSTONE, COMMENTARIES, 208-234; ATKINSON, WILLS 38, 39 (2d ed. 1953); ROLLISON, WILLS 17-28 (1939).

⁹³ See ATKINSON, WILLS 37, 41 (2d ed. 1953); 1 PAGE, WILLS § 1.4 (Bowe-Parker Rev. 1960).

ecclesiastical courts undertook the task of distributing the *personal property* of a decedent.⁹⁴ It is not clear, especially in the early medieval period, precisely who was entitled to the decedent's personal property. The rules of distribution were finally fixed by the Statute of Distribution of 1670.⁹⁵ This Act became the foundation of the English law of succession to personalty and formed the basis of most statutes in this country, including that of Illinois.

Inasmuch as the "heir" under the canons of descent and the "next of kin" under the Statute of Distribution were not the same persons, it is obvious that the application of the doctrine of equitable conversion affected substantially the devolution of the rights and liabilities of intestate vendors and purchasers in most cases. Primogeniture, of course, has long since passed from Anglo-American law; and under modern statutes of descent and distribution, heirs and next of kin, for the most part, are the same persons taking in the same shares. Where this is so, the application of the doctrine of equitable conversion frequently does not change devolution on the death of either the vendor or purchaser intestate. Some statutes, however, do draw a distinction between realty and personalty in some instances. Thus, in Illinois, if one dies intestate, survived by one's spouse and parents, brothers or sisters, but no descendant, *all* of the *personalty* is distributed to the surviving spouse; only *one-half* of the *realty* passes to her, while the other one-half passes to the parents, brothers and sisters.⁹⁶ Under such circumstances, the doctrine of equitable conversion may have great impact on the rights and liabilities of the surviving relatives of the decedent.

The basic principles applicable in this area have been well summarized by a noted authority:⁹⁷

The doctrine of equitable conversion by contract had its origin in cases involving the devolution of rights and liabilities under land contracts upon the death of one of the parties. Suppose that the vendor who has contracted to sell Blackacre dies intestate before completion. Legal title descends to the heir; but is the heir entitled to enforce the contract and receive the purchase money, or is the vendor's administrator entitled to the purchase money as personal estate and the heir liable to be deprived of legal title to the profit of the next-of-kin? Or suppose that the purchaser dies: His estate is liable for the unpaid

⁹⁴ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 626 (1922).

⁹⁵ 22 & 23 Car. II, c. 10.

⁹⁶ ILL. REV. STAT. ch. 3, § 11 (1961).

⁹⁷ Simpson, *Legislative Changes in the Law of Equitable Conversion*: I, 44 YALE L.J. 559, 561-62 (1935).

purchase price, but who is to pay it, as between heir and administrator, and who is to get the land? The answer of classical equity to these questions was a clear-cut and logical one. The vendor from the time of the contract had a claim for money secured by a vendor's lien on the land. On his death, his administrator succeeded to the money claim; and, in equity, the security followed the debt and could be realized upon by the executor although legal title had passed to the heir, a donee. The purchaser, on the other hand, from the time of the contract was regarded in equity as owner of the land and as debtor for the purchase money. On his death, his heir took this 'land' by descent and his administrator became liable to pay the purchase money out of the personal estate and thus exonerate the land from the vendor's lien thereon. Thus, in the case of the vendor's death, legal title is taken from the heir to enable the administrator to recover the purchase price for the benefit of the next-of-kin; while, in the case of the purchaser's death, the heir receives the land *gratis* at the expense of the next-of-kin.

We turn now to the Illinois cases, in which these principles have been well exemplified.

Death of Vendor

In Rhodes v. Meredith,⁹⁸ V contracted to sell farm land to P. V died intestate, and his widow, W, as administratrix of his estate, filed a bill in equity joining as defendants P and a minor child, X, and alleging that (a) individually and as administratrix, she was ready to comply with the terms of the contract by executing a deed to P upon his compliance therewith and (b) X was V's legally adopted daughter and as such was entitled to inherit from him as though she were a natural child. A decree was entered directing W to execute the deed, which she did. Subsequently, a brother of V brought the instant suit, for partition, claiming an interest in the real estate as an heir of V and contending that X was not a legally adopted child and had no interest in the property. The Supreme Court held that it was unnecessary to determine the adoption issue. Under the doctrine of equitable conversion, the interest of V, after the making of the contract, was personal property; and as such if X had not been legally adopted the *entire* interest passed to W, but if legally adopted a *one-third* interest passed to W and a *two-thirds* interest to X. In short, inasmuch as V's interest was not realty his brother, in either event, took nothing upon V's death intestate.⁹⁹

The Court said:

Again, the situation presented by this record requires the application of the doctrine of equitable conversion . . . When a valid, enforceable contract has

⁹⁸ 260 Ill. 138, 143, 102 N.E. 1063 (1913).

⁹⁹ See Footnote 1, *supra* for the controlling statutory provision.

been entered into for the sale of real estate, as between the vendor and vendee equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money, which is personalty . . . Where the owner of real estate thus enters into a valid contract for its sale, the nature of his estate under the doctrine of equitable conversion is changed and the real estate will be regarded as converted into personal property, and, in case of the death of the vendor before the contract is performed, it will be treated as assets in the hands of his personal representative. . . .

. . . [I]n the case at bar the vendor of the real estate died intestate. There is nothing here to prevent the full operation of the doctrine of equitable conversion. Applying that doctrine, [the vendor] owned none of the real estate at the time of his death which in this proceeding is sought to be partitioned among his collateral heirs. Instead of the real estate, at the time of his death he owned the obligation of [the purchaser] to pay the consideration, and this was personalty, and as such belongs to the administratrix, to be by her disposed of and distributed in due course of administration. . . . The contract was valid and enforceable, and the doctrine of equitable conversion applies to and converts whatever interests [the vendor] had in the land into personal property. Under this view, the question whether [X] is the legally adopted daughter of [the vendor] becomes unimportant. If she be the adopted daughter, then the personal estate of her adoptive father would, under the statute of descent, pass to her and the widow. If she was not legally adopted, then [the vendor] died leaving no child or children or descendants of such child or children, and the widow, in that contingency, would be entitled to all of the personal property.

The principles enunciated in *Rhodes* were reaffirmed in a definitive way in *Shay v. Penrose*.¹⁰⁰ In *Rhodes*, V left him surviving W, his widow, X, a minor child, and a brother. If X had not been legally adopted and if the principle of equitable conversion had not been applicable, the brother would have been entitled to a half interest in the property. In *Shay*, V left her surviving her husband, W, and a sister. The Court stated the facts succinctly:

. . . Between 1955 and 1960 she executed contracts for deed to separate purchasers of four of the properties . . . they are the type of contract for deed in common usage by the profession. Each provided for a down payment with the balances payable in varying amounts per month together with interest on the balances from time to time unpaid. Each buyer went into possession under his contract. Provisions were made for delivery of abstracts of title showing merchantable title in seller, title examination by the buyers, methods of perfecting any title defects, and delivery of warranty deeds upon receipt of final payment. The seller retained an option of forfeiture in the event the buyer failed to perform his covenants, including that of making the specified payments.

The sister's contention, as stated by the Court, was "that equitable conversion does not apply to a long term contract for the sale of real

¹⁰⁰ See footnote No. 58, *supra*.

estate prior to the time that both parties have performed all acts necessary to complete the contract except tender of final payment and delivery of the deed;" and she sought partition of the four properties on the theory that under Section 11 of the Probate Act she was seized of an undivided one-half interest in each parcel. The Court refused to draw any distinction between a "long term" or installment contract and a contract which contemplates payment of the purchase price in a lump sum, and said:

... Equitable conversion took place at the time of execution of the contracts, so that upon the death of the seller the plaintiff became entitled to the entire unpaid balance of the purchase price as personal representative of the decedent, since it was personal property under the doctrine of equitable conversion. The option to declare the contract in default and the right to consent to the assignment were therefore vested in the plaintiff as administrator.

Whether one agrees with the result in *Shay* or not, the case has the decided merit of settling a vexing issue; for the Court, at long last, has laid *Chappell* to rest. It has done so in unmistakable terms:

... We believe the correct view to be that expressed in the majority of the cases which hold equitable conversion takes place at the instant a valid and enforceable contract is entered into and that the buyer at that time acquires an equitable title. To the extent that the *Chappell* case and those following it are inconsistent with this view they are hereby expressly overruled.

The Court refused, however, to speculate on the effect of the decision in other areas, saying:

The defendant seeks, in effect, a definitive rule of application of the doctrine in the several fields where it may be invoked, such as dower, insurance, joint tenancy and the like. The issue here presented is devolution of title at the death of the seller and we concern ourselves in this opinion only with that issue.

If, after the making of a land contract, V dies intestate, it seems clear that his "interest", being personalty, is not subject to partition, since only "lands, tenements, or hereditaments" may be partitioned under the statute.¹⁰¹ In *Ward v. Williams*,¹⁰² V died intestate, holding legal title to farm land which he had contracted to sell to P. He was survived by W, his widow, children and grandchildren as his only heirs. In holding that a partition action would not lie, the Court said:

We think . . . that the court erred in determining . . . that the land descended to his heirs and therefore was subject to partition among the heirs and their grantees. The equitable title to those two tracts of land was not in [V] at the time of his death, but was in [P]. [V] had a lien . . . to secure the payment

¹⁰¹ ILL. REV. STAT. ch. 106, § 1 (1961).

¹⁰² 282 Ill. 632, 641, 118 N.E. 1021, 1025 (1918).

of the purchase money. He held the naked legal title in trust for the benefit of [P] . . . 'Where the owner of real estate thus enters into a valid contract for its sale, the nature of his estate, under the doctrine of equitable conversion, is changed and the real estate will be regarded as converted into personal property, and, in case of the death of the vendor before the contract is performed, it will be treated as assets in the hands of his personal representatives.' Rhodes v Meredith, 260 Ill. 138, 102 N.E. 1063.

In *Butman v. Butman*,¹⁰³ after V's death intestate, W, individually and as administratrix, filed a bill for specific performance of the contract, joining as defendants P and certain collateral heirs (presumably brothers and sisters of V). She alleged that (a) P was willing to perform the contract, provided he obtained a deed from all the heirs, but that the collateral heirs had refused to execute a deed unless the proceeds were treated as realty, and (b) the proceeds of the sale and the right to enforce the contract were choses in action, to be collected by the administratrix and accounted for in due course of administration. The Circuit Court sustained a demurrer to the bill. One of the grounds for demurrer was that W was "seeking to convert real estate into personal property, so that she may, under the rule of descent, derive a greater portion thereof than she would if it should remain real estate; and that, as between the parties the equities require that the property should remain and be treated as real estate." The Court, without passing on the question of equitable conversion, held simply that W, as administratrix, had properly brought the bill for specific performance and that the demurrer should be overruled. The Court said:

Whether the property be regarded as real or personal, appellant was materially and directly interested therein in her individual capacity. If treated as real estate, she is the owner of half of it in fee, and, if personal property the whole of it, subject, of course, in both cases, to the payment of the debts of the decedent. The owner of property may, by deed, will or other conveyance, dispose of it as to him seems best, but if he dies without making any disposition of it, it takes the course directed by the Statute of Descent. As to the policy of the statute that gives to the widow of an intestate who leaves no child or children, or descendants thereof, half of his real estate and all of his personal property, that matter is referable to the legislative authority and not to the courts.

If, *prior* to the making of the contract, V had executed a will by which he devised the property to X, is the devise adeemed by the contract? The devise would have been adeemed, of course, by a *deed*, since a will can pass only such property as the testator has at his

¹⁰³ 213 Ill. 104, 113, 72 N.E. 821, 824 (1904).

death.¹⁰⁴ Indeed, where realty was involved, the common law rule was that "a devise of land is *revoked* by a conveyance of the land by a testator during his lifetime."¹⁰⁵ Under this doctrine, "even if the land was later reacquired by the testator it would not pass under the will."¹⁰⁶ This "was a special application of the general principle that after-acquired realty could not be devised."¹⁰⁷

These principles would seem to lead irresistibly to these conclusions: If V, by entering into the contract, transferred an equitable title to P, the devise made in his previous will was adeemed. In that event (a) if the sale is consummated after V's death, the proceeds thereof should pass to the executor and then to the legatee or legatees entitled to the moneys in his hands, and (b) if the sale is *never* consummated, the property nevertheless should be treated as personalty and pass as such under the will. In either case the devisee is in the same position as the heir at law where V dies intestate: Each holds the naked legal title; in each case, the personal representative is entitled to all of V's rights under the contract.

The Courts of this state, however, do not seem to have passed on either of these questions. Chancellor Kent, in *Walton v. Walton*,¹⁰⁸ said:

... a valid contract, for the sale of lands devised, is as much a revocation of the will in equity as a legal conveyance of them would be at law.

Suppose the situation is reversed: V enters into the contract and *subsequently* makes a will devising the land. Here no ademption will

¹⁰⁴ 57 AM. JUR., WILLS, § 1582, p. 1082: "The rule is universal that in order to make a specific legacy effective the property bequeathed must be in existence and owned by the testator at the time of his death. . . ."

¹⁰⁵ *Meily v. Knox*, 269 Ill. 463, 466, 110 N.E. 56, 58 (1915); *Brady v. Paine*, 391 Ill. 596, 601, 63 N.E. 2d 721, 724 (1945): "The rule is well settled that if the testator, in his lifetime, disposes of property *specifically* devised by him, this will operate as a revocation of the devise." But see *Strang v. Day*, 362 Ill. 110, 199 N.E. 263, 264: "The rule which is best supported by reason is that there is no implied revocation of a devise of real property where the testator conveys the property, reacquires title thereto, and dies without republishing his will." *Strang* involved a *general* devise of all the testator's realty. After the will was executed, the testator conveyed the parcel in question to the devisee. Thereafter he reacquired it and owned it at his death. The Court held that the devise was effective to give the devisee the parcel.

¹⁰⁶ ATKINSON, WILLS, § 134, p. 743 (2d ed. 1953).

¹⁰⁷ 2 PAGE, WILLS, § 21.79, p. 485 (Bowe-Parker Rev. 1960). Today, in most jurisdictions, "the alienation of property devised by a prior will does not prevent such property from passing under the will if testator reacquires it thereafter." *Id.*, p. 486. See *obiter* in *Oglesby v. Springfield Marine Bank*, 395 Ill. 37, 69 N.E. 2d 269, 279 (1946). And see *Strang v. Day*, footnote 105, *supra*.

¹⁰⁸ 7 Johns. Ch. 256, 267 (N.Y. 1823).

take place. True, an equitable conversion will have occurred the moment the contract was signed, and the equitable title will have vested in the purchaser. In this case, however, V, with knowledge that he has contracted to sell the land, devises it. Our Supreme Court has held that, in such case, he must be deemed to have intended that the devisee receive whatever rights V himself might have had under the contract at the time of his death. If, therefore, the sale is consummated after V's death, the *proceeds* pass to the devisee; if it is not consummated, the *land* passes to him.

In *Heirs of Wright v. Minshall*,¹⁰⁹ V devised lands to his sister. Thereafter he entered into contracts of sale which remained executory at his death. P paid the purchase price in full to the administrator of V's estate, and V's heirs applied to the Probate Court for a prorata distribution of the proceeds. The Supreme Court held that the devisee was entitled to the entire proceeds, and said:

At the time the will was made, the testator held the legal title to this land. . . . Suppose the party who had agreed to purchase it, had failed to perform his contract, or the contract had been rescinded, it will not be pretended the land would have gone to the heirs-at-law. It would have been controlled by the will. By that, the legal title was devised to appellee, and there can be no question she is rightfully entitled to the proceeds of this legal title when sold and conveyed, and this, manifestly, was the intention of the testator. His intention was, to devise to appellee such interest as he had in or to arise from the land, and that was the purchase money, and, though described in the will as land, the devise passed the purchase money.

In *Beemer v. Beemer*,¹¹⁰ in a similar situation, the Court said:

. . . By the contract . . . [V] merely agreed to make a conveyance of this land . . . at a future time upon the payment of the purchase price. He still held the legal title. If the purchaser failed to comply with his part of the agreement the land remained the property of [V] if he should live, and, if the failure to perform should occur after his death the title then passed to his devisee.

Nor would [the devisee] be a mere trustee for the conveyance of the legal title and the devise to her be an empty one in case [P] should perform his part of the contract after the death of the testator. In that event the proceeds of the real estate devised . . . subsequently to the contract of sale would belong to [the devisee] under the will . . . By this devise the testator made it certain that in the event the purchaser failed to perform, the land would go to [the devisee], and in the event the contract was fulfilled and the purchase price paid she would then receive the proceeds.¹¹¹

¹⁰⁹ 72 Ill. 584, 585-86 (1874).

¹¹⁰ 252 Ill. 452, 463-69, 96 N.E. 1058, 1062 (1911).

¹¹¹ To the same effect see *First Trust and Savings Bank v. Olson*, 353 Ill. 206, 187 N.E. 282 (1933), *Covey v. Dinsmoor*, 226 Ill. 438, 80 N.E. 998 (1907).

In brief, the consequences flowing from the death of the *vendor* prior to the consummation of the sale, may be thus summarized: His rights under the contract vest in his personal representative, since he is regarded, in equity, not as the owner of realty but of a chose in action for the recovery of the purchase price. If he dies intestate, the naked legal title to the land will descend to his heirs at law; if testate, it will vest in the devisee under his will. In either case, the personal representative may bring an action in equity for specific performance of the contract, joining P and the heirs or devisee of V, as the case may be, as defendants. The decree will require the heirs or devisee to convey, but it will direct that the purchase price be paid to the personal representative. Thus, no beneficial interest passes to the heirs or devisee; they hold title solely as security for the payment due to the administrator or executor.

Death of Purchaser

If the *purchaser* dies intestate before the sale is consummated, his equitable title to the property will descend to his heirs at law; if he dies testate, it will vest in the devisee under his will. In either case, the title will be subject to the lien of the vendor for the payment of the balance of the purchase price. *But the heirs or devisee may compel the purchaser's personal representative to pay this unpaid balance out of personalty in the purchaser's estate, and they will then take the property free and clear.*

The reason for this rather startling result is that, under Illinois law, the personal property in a decedent's estate must be used for the payment of his debts before any recourse is had to the real estate. Realty, then, is a *secondary* fund; it may be sold, under order of the Probate Court, only when the personalty is insufficient to pay claims.¹¹² This rule is applicable to *all* debts of the decedent, secured and unsecured. Hence, a debt secured by a mortgage on the decedent's real estate must be paid by the personal representative out of the decedent's per-

¹¹² The Probate Act (ILL. REV. STAT., Ch. 3, § 225) (1961) provides: "When there is insufficient personal estate to pay expenses of administration, claims against the estate, or legacies expressly or impliedly charged by the decedent's will upon his real estate, the executor or administrator by leave of the Probate Court . . . may sell . . . for those purposes real estate or interest therein to which the decedent had claim or title. . . ." See *People v. Beckers*, 413 Ill. 102, 104, 108 N.E. 2d 5, 6 (1952): "[T]he general rule in the administration of estates in Illinois [is] that personal property must be exhausted to pay debts and expenses of administration before resort may be had to real estate, unless a contrary intent is expressly indicated or may be clearly implied from the provisions of decedent's will."

sonal estate; the liability to "exonerate" the land from the encumbrance falls upon the administrator or executor.¹¹³ In like manner, the heir or devisee of the purchaser is entitled to have the personal representative "exonerate" the land from the vendor's lien by paying the purchase price out of personalty in his hands.¹¹⁴ In either case, the heir or devisee is enriched at the expense of those who are to receive the decedent's personal property.

In *Sutherland v. Harrison*,¹¹⁵ P died intestate, survived by his widow, W, a brother, and nephews (children of two predeceased brothers), as his only heirs at law. W was appointed administrator. Shortly thereafter the other heirs filed a bill for partition. A decree was entered finding that W was entitled to one-half of the realty, and the other heirs the remaining one-half. Thereafter V's personal representative filed a bill in equity against *all* the heirs, praying that they be directed to pay the amount due V under the contract upon tender of a deed, and in default thereof that the contract be annulled. The brother and nephews of P filed a cross bill, praying that W be required to pay the amount due under the contract out of the personal estate. The Circuit Court found that W ought, in equity, to pay out of her own funds, without contribution from the other heirs, the balance due under the contract, and that upon such payment the personal representative of V should convey the premises to the defendants in the proportions of a one-half interest to W and a one-half interest to the other heirs. After payment of expenses of administration, the widow's award, and all claims allowed against the estate, the personal property was sufficient to pay the unpaid balance of the purchase price. The Court said:¹¹⁶

There are no disputed facts here, the questions involved being those of law, and mainly the one whether the widow should be held to pay the entire amount of the unpaid purchase money for this acre of land, or only her proportional part thereof, according to her interest in the land.

¹¹³ As to exoneration of mortgaged land, see 3 WOERNER, *AMERICAN LAW OF ADMINISTRATION*, § 494 (3d ed. 1923); 40 HARV. L. REV. 630 (1927). The cases are collected in *Annotations* in 5 A.L.R. 488, 19 A.L.R. 1429, 29 A.L.R. 1246, 72 A.L.R. 709.

¹¹⁴ *Milner v. Mills*, Mos. 123 (Ch. 1729); *Young v. Young*, 45 N.J. Eq. 27, 34, 16 Atl. 921, 925 (1889), 57 AM. JUR. WILLS, § 1474: "Applicability of the broad principle that the personal estate of a testate decedent is the primary source for the payment of his debts to the exoneration of real property devised by a will from payment of mortgage or other liens created thereupon by the testator during his lifetime is recognized in many decisions, with the result that in the absence of controlling statutory provisions or the expression of any contrary intention on the part of the testator, a devisee is . . . entitled to have such liens paid from the residuary estate in exoneration of the land devised."

¹¹⁵ 86 Ill. 363 (1877).

¹¹⁶ *Id.* at 365.

Our statute . . . provides, that 'when there shall be a widow and no child or children or descendants of a child or children of the intestate . . . then the one-half of the real estate, and the whole of the personal estate, shall go to such widow as her exclusive estate forever.'

Under this provision, is the widow entitled to have and enjoy the personal property which she has received as distributee, without the deduction of this debt in question?

It is a well-settled principle, that in the administration of assets the personal estate is the natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted before the real estate can be made liable; and it will not be exonerated by a charge on the real estate, unless there be express words, or a plain intent, in the will, to make such exoneration.

The Court said further:¹¹⁷

[N]o dissent is found in the cases from the general doctrine that *where one gives a mortgage on land for a debt of his own contracting, his personal estate is the primary, not the auxiliary, fund for the payment of the mortgage debt, and the debt should be paid out of the personal property to the exoneration of his real estate.* . . . If a mortgage creditor proceeds against the land, the heir or devisee is *prima facie* entitled to reimbursement out of the personal estate.

As respects a contract for the sale of land, in the view of a court of equity, that which is effectually contracted to be done, is to be considered as done, and it holds that such contracts are, for the most part, equivalent in equity to actual conveyances in law. The vendor, as between him and the vendee, is from the time of the contract regarded in equity as a trustee of the land for the purchaser, and the latter a trustee of the purchase money for the former, so that the purchaser is treated as the equitable owner of the land, and it is devisable and descendable as is real estate; and the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable in like manner on his death. . . . And . . . unless some circumstances affect the case, *the heir of the purchaser may require the purchase money to be paid out of the personal estate of the purchaser in the hands of his personal representative.* Indeed, so far from there being any distinction in this respect . . . between the case of a mortgage debt where there is a mortgage on land, and that of a debt for the unpaid purchase money for land where there is a vendor's lien therefor, there are numerous explicit decisions to the contrary, which directly hold that in case of such unpaid purchase money the personal representative must pay the purchase money out of the personal property for the benefit of the heir.

The Court concluded as follows:¹¹⁸

We find no circumstance here to differ the debt in question from any ordinary debt of the decedent in respect of payment of it by the administrators, and are of opinion that it ought to be paid out of the personal estate and that the heirs had the right to so require, and, as appellant as distributee had received more than sufficient for the purpose, that the court below rightly decreed the payment by her.

¹¹⁷ *Id.* at 367, 368 (Emphasis added).

¹¹⁸ *Id.* at 370.

In *Watts v. Killian*,¹¹⁹ the Supreme Court, in citing *Sutherland* with approval, said:¹²⁰

The law applicable where the question arises between a widow and heirs or devisees was determined in *Sutherland v. Harrison*. . . . The court said it was *well settled that the personal estate is the . . . primary fund for the payment of debts . . . and that there was no distinction between the case where there is a mortgage on land and that of a debt for unpaid purchase money for land where there is a vendor's lien therefor*. . . . A decree requiring the widow to pay out of her own money without contribution from the heirs, the amount of the vendor's lien, was affirmed.

The issue in *Watts* was whether the devisee was entitled to have the personal representative exonerate the land from a *mortgage* by payment of the mortgage debt from the personalty in his hands. The Court, in holding that she was, said¹²¹ that there "is no distinction in principle between that case [*Sutherland*] and this."

From a strictly logical point of view, the result reached in these cases seems reasonable enough. If we take as our premises (a) that the decedent himself, and not the land encumbered as security, was primarily liable for the debt, (b) that the primary fund for the payment of the decedent's debts (secured and unsecured) is the personalty in his estate, and (c) that the equitable interest of the decedent devolved as land, we are driven irresistibly to the conclusion, as a matter of strict logic, that the land must be paid for by the personal representative out of the decedent's personal estate. But however logical, and however well suited to a society of landed gentry desirous of keeping their land holdings intact from generation to generation, and however consistent with the spirit of the old English law which "favours the heir,"¹²² the result reached, it is believed, would seldom be in accord with the decedent's intent. Most testators, if their attention had been directed to the point, probably would have provided expressly that their interests under land contracts and their equities of redemption in mortgaged properties should *not* be exonerated at the expense of their personal estate; and most persons dying intestate probably would have viewed such exoneration with similar disfavor.

Indeed, the rule caused such hardship and injustice that in England, as early as 1854, Parliament passed an Act providing that there should

¹¹⁹ 300 Ill. 242, 133 N.E. 295 (1921).

¹²⁰ 300 Ill. at 247, 133 N.E. at 297 (Emphasis added.)

¹²¹ 300 Ill. at 247, 133 N.E. at 297.

¹²² Shadwell, V.C. in *Lumsden v. Fraser*, 12 Sim. 263 (Ch. 1841).

be no right of exoneration of mortgaged land upon intestacy, and none where the mortgagor died testate unless expressly provided for in his will.¹²³ In 1877 Parliament extended this rule to "any other equitable charge, including any lien for unpaid purchase money."¹²⁴ The effect of these statutes, commonly referred to as Locke King's Acts, is to leave the personal representative liable for the purchase money or mortgage debt, but to make such indebtedness ultimately payable out of the purchased or mortgaged land, if sufficient for the purpose, rather than out of the intestate or residuary personal estate. The heir or devisee thus takes subject to the vendor's lien or the mortgage, and the personal estate going to the next of kin or residuary legatees is unaffected unless (a) the land is insufficient to pay the indebtedness due to the vendor or mortgagee, or (b) in the case of death testate, the testator expressly provides for exoneration.

There is very little legislation abrogating the right of exoneration in this country; and where such legislation exists, it is much less broad than in England.¹²⁵ There is no statute in Illinois touching on this subject. An Act to relieve the personal estate of the burden of exonerating mortgaged realty and realty contracted to be purchased by the decedent (except where the burden of exoneration is expressly imposed by will) would seem to be highly desirable.

OPTION CONTRACTS

Suppose V gives P an option to purchase Blackacre. V then makes his will, devising all his real estate to X, and all his personal estate to Y. After V's death, P exercises the option. Who is entitled to the purchase money, X or Y? In *Lawes v. Bennett*,¹²⁶ the English Court held that Y was entitled to the purchase money. The Court reached this conclusion by holding that when the option was exercised the contract of sale, which then came into being, *related back to the date of*

¹²³ 17 & 18 Vict. c. 113 (1854), amended by 30 & 31 Vict. c. 69 (1867).

¹²⁴ 40 & 41 Vict. c. 34 (1877).

¹²⁵ See statutory provisions in Louisiana, Massachusetts, Missouri, New Jersey, New York and Oregon. N.Y. Real Prop. Law, § 250 provides: "Where real property, subject to a mortgage executed by any ancestor or testator, or subject to any other charge, including a lien for unpaid purchase money, descends to a distributee or passes to a devisee, such distributee or devisee must satisfy and discharge the mortgage or other charge out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be in the will of such testator a direction, expressly or by necessary implication, that such mortgage or other charge be otherwise paid."

¹²⁶ 1 Cox (1785), Ch. Cas. 167, 29 Eng. Rep. 1111, 1113-14.

the decedent's death; hence the property devolved in all respects as though a binding contract in fact had been in effect when the decedent died. The Court there said:

It is very clear that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is that it is, left to the election of [the optionee, P] whether it shall be real or personal. . . . [W]hen the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period.

It will be observed that to reach this result *Larwes* applied *two* fictions: (a) the fiction of relation back which created a contract as of a time when it had not been made and (b) the fiction of equitable conversion so as to transform realty into personalty. There are two obvious difficulties with the decision:

(1) It enables P, *a stranger*, to determine the devolution of property rights: the rights of devisee and legatee if V died testate, and the rights of heirs and next of kin if he died intestate. If he exercises the option, the legatee or next of kin of V receives the proceeds of the sale; if he fails to exercise the option, title to the land, *both legal and equitable*, vests in the devisee or heirs.

(2) As we have seen,¹²⁷ there can be no equitable conversion, in the absence of a binding contract, capable of being specifically enforced "against an unwilling purchaser." An option is not a contract of sale, but an irrevocable offer to sell; it has been defined as "a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, . . . and which imposes no obligation to purchase upon the person to whom it is given."¹²⁸ During V's lifetime, then, there is no binding, specifically enforceable contract; and no conversion has occurred as of his death.

The majority view in this country¹²⁹ is *contra* to the rule of *Larwes v. Bennett*. Most of the American cases have held that conversion occurs when the option is exercised, but that it does not relate back to the date of the testator's death so as to divest the devisee or heirs of the title which has passed to them under the will or the Statute of Descent, as the case may be.

¹²⁷ See p. 23 and cases cited in footnote 68, *supra*.

¹²⁸ 55 AM JUR., *Vendor and Purchaser*, § 27, pp. 492-493 (Emphasis added.)

¹²⁹ 4 POMEROY, EQUITY JURISPRUDENCE, Sec. 1163, p. 489 and the cases there cited.

In *Adams v. Peabody Coal Co.*,¹³⁰ V gave P an option, and thereafter executed a will devising the land to X. P exercised the option after V's death. The Chancellor held that the purchase money should be treated as personalty and pass to the legatee. The Supreme Court reversed, holding that the devisee, X, was entitled to the proceeds of the sale.

On a superficial analysis this case *appears* to be *contra* to *Lawes v. Bennett*. This, however, is not necessarily so; for, as we have seen, *even if V had entered into a binding, enforceable contract to sell during his lifetime*, a subsequent will devising the land to X would pass the proceeds of the sale to him.¹³¹ This is on the theory that V, knowing that he has entered into a contract to sell the land, intends, when he thereafter executes a will devising it, to pass to the devisee whatever rights V himself would have had if he had survived; that is to say, if the contract should not be performed by P, V intended X to have the land, otherwise he intended X to have the money. If this is true where V has entered into an enforceable *contract of sale*, *a fortiori* it is true where V has given P only an option which is unexercised at V's death.

DOWER

At common law a wife had no dower, inchoate or consummate, in her husband's equitable estates.¹³² An essential element of dower was that the husband have seisin during coverture, and he could be seised only of a legal estate.¹³³

The legislature of this state has specifically provided for dower in equitable estates. The pertinent portion of the statute provides:¹³⁴

Real estate contracted for by the deceased spouse in his lifetime, the title to which may be completed after his death, and equitable estates are subject to the right to elect to take dower.

It is difficult to understand how the courts can hold, in the face of the clear wording of this Act, that P's widow¹³⁵ is not entitled to

¹³⁰ 230 Ill. 469, 82 N.E. 645 (1907).

¹³¹ See pp. 33-34 *supra* and footnotes 109 and 110.

¹³² 17 AM. JUR. DOWER, § 59: "The necessity of legal seisin also made it impossible at the early common law to base dower on the purely equitable interest of a *cestui que trust*."

¹³³ *Bowen v. Collins*, 15 Ga. 100 (1854); *Beebe v. Lyle*, 73 Mich. 114, 40 N.W. 944 (1888); *Worsham v. Callison*, 49 Mo. 206 (1872).

¹³⁴ ILL. REV. STAT. ch. 3, § 18 (1961).

¹³⁵ Or widower, since all provisions of the statute relating to dower are applicable to husbands and wives alike.

dower upon P's death. Yet a number of cases in this state have so held.¹³⁶ Most of these cases have quoted with approval this statement in *Walters v. Walters*.¹³⁷

Where there is a contract to purchase, and the purchaser has not paid the entire purchase money in his lifetime, and, so has not become invested with an equitable fee, no right to dower attaches at his death.

The value of *Walters* as an authority, however, was *always* extremely doubtful; for the premise for the Court's conclusion that the widow had no dower was this:

[W]hen [P] died he did not own the equitable title in the premises, because his contract had not been performed. A mere contract to convey at a future time upon the performance of certain acts by the purchaser, does not create an equitable title.

For this proposition, the Court quoted from and relied upon *Chappell v. McKnight*.¹³⁸ Inasmuch, however, as *Chappell* has now been expressly overruled,¹³⁹ *Walters* should suffer the same fate. There would seem to be no basis whatever for continued adherence to the rule announced in *Walters* and other cases that P's surviving spouse is not entitled to dower.

Moreover, even if the premise on which the Court relied in *Walters* had been correct, the result reached, it is believed, in any event was wrong. Whether or not P had an equitable estate from the moment the contract was made was beside the point; for it will be noted that under the statute above quoted W's right to dower is not dependent upon an "equitable estate" in P. The statute specifically provides for dower in any "real estate contracted for by the deceased spouse in his lifetime, the title to which may be completed after his death." Since this provision deals in specific terms with a specific subject matter it should be controlling. The clause "and equitable estates are subject to the right to elect to take dower" is certainly not a qualification of, or limitation upon, the provision.

If it be urged, in support of the doctrine of *Walters* and similar cases, that in order to permit dower to attach, *some* estate, either legal or equitable, must have been vested in the deceased spouse during

¹³⁶ *Tink v. Walker*, 148 Ill. 234, 35 N.E. 765 (1893); *Stow v. Steel*, 45 Ill. 328 (1867); *Owen v. Robbins*, 19 Ill. 545 (1858).

¹³⁷ 132 Ill. 467, 481, 23 N.E. 1120, 1121-22 (1890).

¹³⁸ 108 Ill. 570.

¹³⁹ See *Shay v. Penrose*, footnote 58, discussed *supra* at pp. 25, 30-31.

coverture, a sufficient answer would seem to be that upon payment of the purchase price by P's personal representative, P's title should be deemed to relate back to the date of death to enable the surviving spouse to claim dower.

This doubtless was the theory upon which the Court proceeded in *Greenbaum v Austrian*,¹⁴⁰ although it did not spell out the theory in those terms. There it was held that if the administrator paid the purchase money the widow's dower would attach. The Court also intimated that if the personal estate was insufficient and P's heirs made the payments from their own funds, W could perfect her dower rights by contributing her prorata portion of the purchase money. If this is true, then even though W were not normally entitled to dower, she would be entitled thereto if the contract were performed by the heirs and if she made her ratable contribution to the purchase price.

There remains to be considered this question: May the parties to a contract for the sale of real estate provide, in the contract itself, that the doctrine of equitable conversion should not apply? If such a provision is effective, it will of course avoid the problems presented by the doctrine. In at least one case, *Mackey v Sherman*,¹⁴¹ it has been held that such a provision should be given effect. It would seem that, in some situations at least, this provision would be highly desirable—as, for example, if it appears probable that one of the contracting parties may not survive to consummate the sale.

¹⁴⁰ 70 Ill. 591 (1873).

¹⁴¹ 263 Ill. App. 109 (First Dist. 1931).

[TO BE CONCLUDED]